

MAY 22 2007

REMARKS

In the Final Office Action mailed January 30, 2007, and Advisory Action mailed April 30, 2007, claims 1-21 and 23-39 were pending. Claims 3-7, 23 and 24 were withdrawn from consideration, and claims 1, 2, 8-21 and 25-39 were finally rejected. This amendment is filed along with a Request for Continued Examination (RCE). Claims 1 and 25 have been amended. Reconsideration of the present application as amended and including claims 1-21 and 23-39 is respectfully requested.

Claims 1, 2, 8-21, and 25-39 were rejected under 35 USC §102(b) as being anticipated by U.S. Patent No. 2,699,774 to Livingston. Claims 1 and 25 have been amended above. Support for the amendments may be found through the specification and drawings and in specification locations, such as at paragraph [0030] and associated Figures of the publication of the present application.

Livingston discloses a pin that extends along a linear longitudinal axis along the length of the device. In Fig. 7 the device is curved around the longitudinal axis to form a circular cross-section. In Fig. 6, the device includes portions along its length that are configured symmetrically about the longitudinal axis. These portions are curved relative to one another and around the longitudinal axis such that the longitudinal axis of the device defines a straight line along the length of the device. Rod 37 has a circular cross-section so that when the rod 37 is inserted in the bore of shell member 19, shell member 19 expands radially along its length. The linear rod 37 maintains the longitudinal axis of shell 19 in the form of a straight line, as shown in Fig. 6, when shell member 19 is expanded. There is no disclosure or suggestion of a device including a curved configuration along a longitudinal axis, wherein said curved configuration forms an arc along a length of said stabilization device and said arc and said longitudinal axis are co-linear, as recited in claim 1 in combination with the other features therein. Nor is there any disclosure or suggestion of a device including a curved configuration along a longitudinal axis, wherein said curved configuration forms an arc that is co-linear with said longitudinal axis as recited in claim 25 in combination with the other features recited therein. Thus, Livingston fails to disclose or suggest at least these features in claims 1 and 25, and cannot anticipate these claims. Withdrawal of this basis of the rejection of claims 1 and 25 is respectfully requested.

Furthermore, claim 1 recites "said stabilization device including a cross-section along said length with said length and cross-section sized for positioning through a pathway formable

from an opening in a lateral mass of a first vertebra and into the first vertebra, through a facet joint formed by an articular surface of the first vertebra and an articular surface of an adjacent bony structure, and into the adjacent bony structure." Claim 1 recites a device having structural features that allow it to be employed in a specific anatomical location. Shell member 19 has a configuration in which the longitudinal axis extends along a straight line and therefore is not structured such that it could be or is capable of being positioned in or employed in the anatomical locations recited for the device of claim 1. Therefore, withdrawal of the rejection of claim 1 is respectfully requested for this additional reason.

Pending claims 2, 8-21 and 26-39 depending from claims 1 and 25 distinguish Livingston at least for the reasons their corresponding base claims distinguish Livingston and for other reasons.

For example, claim 12 depends indirectly from claim 1 and recites "wherein said inner member includes a leading end nose with a tapered profile, and said outer member includes an inner surface along said passage with a tapered portion adjacent said leading end of said outer member, wherein in said second position said leading end nose engages said tapered portion of said passage to expand said leading end of said outer member." Livingston discloses that the shell member 19 includes shoulders 36 on the inner surface thereof. Shoulders 36 are disclosed as being formed by a reduced diameter portion of bore 35. See col. 2, lines 66-69. The disclosure that the bore changes in diameter does not expressly or inherently disclose a tapered portion between the bore portions, and shoulders 36 appear to be orthogonal to the bore portions. Thus, there is no disclosure that shoulders 36 define a tapered portion. Furthermore, there is no disclosure that rod 37 contacts shoulders 36. Rather, as shown in Fig. 6 of Livingston, shoulders 36 are configured to extend transversely to rod 37 such that the shoulders 36 do not contact rod 37. Accordingly, claim 12 is not disclosed by Livingston.

In other examples, claim 17 recites "wherein said length and cross-section of said stabilization device is structured to extend through the pathway when the adjacent bony structure is a second vertebra." Claim 18 recites "wherein said length and cross-section of said stabilization device is structured to extend through the pathway when the adjacent bony structure is an occiput." Claim 19 recites "wherein said length and cross-section of said stabilization device is structured to extend through the pathway when the adjacent bony structure is a second vertebra, and the pathway is formed to extend through the second vertebra, through adjacent

articular surfaces of the second vertebra and an occiput, and into the occiput.” The Final Office Action asserts that these claims do not distinguish Livingston in terms of structure, and that statements of intended use and other functional limitations are not distinguishable over Livingston, and further asserted that the device in Livingston could be used as claimed. The Final Office Action also asserts that the manner in which the device is to be employed do not differentiate the claims apparatus from the prior art which satisfies the structural limitations. The assertions are traversed. The shell member 19 in Livingston includes a cross-section and length structured to extend through a hole in a bone plate and into a broken bone such as the femur. There is no disclosure that the shell member in Livingston is or could be structured as recited in claims 17-19. Claims 17-19 are directed to the structure of the device and not to functional limitations or intended use. The claimed structural features require a length and cross-section of the device to be adapted for a specific location in the body, which is not disclosed in Livingston. Therefore, a prima facie case for anticipation of claims 17-19 depending from claim 1 has not been made. Withdrawal of the rejection of claims 1 and 8-21 depending from claim 1 is respectfully requested.

Claims 26-39 depending from claim 25 are also allowable at least for the reasons claim 25 is allowable and for other reasons. For example, claim 26 recites “wherein said length and cross-section are sized for positioning in the pathway when the pathway extends from an opening in a lateral mass of a first vertebra and into the first vertebra and through a facet joint formed by adjacent articular surfaces of the first vertebra and an adjacent bony structure and into the adjacent bony structure.” Claim 35 recites “wherein said length and cross-section are sized for the adjacent bony structures to be first and second cervical vertebrae.” Claim 36 recites “wherein said length and cross-section are sized for the adjacent bony structures to be a first cervical vertebra and an occiput.” Claim 37 recites “wherein said length and cross-section are sized for the adjacent bony structures to be first and second cervical vertebrae and the occiput.” As discussed above with respect to claims 17-19, Livingston fails to disclose a device have the length and cross-section sized as recited in claims 26 and 35-37. Accordingly, withdrawal of the rejection of claims 26-39 depending from claim 25 is respectfully requested.

Reconsideration of the present application including claims 1-21 and 23-39 is respectfully requested. The application is believed in condition for allowance, and a Notice of

Allowance is hereby solicited. The Examiner is welcome to contact the undersigned to resolve any outstanding issues with respect to the present application.

Respectfully submitted:

By: 

Douglas A. Collier

Reg. No. 43,556

Krieg DeVault LLP

2800 One Indiana Square

Indianapolis, Indiana 46204-2079

Phone: (317) 238-6333

KD_IM-986596_1

Preliminary Amendment with RCE
Ser. No 10/795,880
MSDI-260/PC853.00
Page 12 of 12